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Received - 2022-04-29 03:01:44 PM
Control Number - 52434
ItemNumber - 32

DOCKET NO. 52434

PETITION OF CELINA PARTNERS, LTD. TO AMEND MARILEE SPECIAL UTILITY DISTRICT'S CERTIFICATE OF CONVENIENCE AND NECESSITY IN COLLIN COUNTY BY EXPEDITED RELEASE	§ § § § § § §	**PUBLIC UTILITY COMMISSION** **OF TEXAS**

MARILEE SPECIAL UTILITY DISTRICT'S
MOTION FOR REHEARING

TO THE HONORABLE PUBLIC UTILITY COMMISSION:

COMES NOW, Marilee Utility District (the "District"), and files this Motion for Rehearing ("Motion") of the Public Utility Commission of Texas's (the "Commission") Order ("Order") amending the District's Certificate of Convenience and Necessity ("CCN") No. 10150 to release 295.854 acres of property ("Tract of Land") in Collin County, Texas.[1] A party must file a motion for rehearing "not later than the 25th day after the date the decision or order that is the subject of motion is signed."[2] The 25th day after April 4, 2022, is April 29, 2022, and this Motion is timely filed.[3] In support thereof, the District respectfully shows as follows:

I. INTRODUCTION

This proceeding for streamlined expedited release was initiated on August 16, 2021, with the filing of a petition by Celina Partners, Ltd. ("Petitioner"), pursuant to Section 13.2541 of the Texas Water Code ("TWC") and 16 Texas Administrative Code ("TAC") § 24.245(h).[4] The petition alleged that the property was greater than 25 acres, not receiving water or sewer service,

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[1] Order (Mar. 14, 2022).

[2] Tex. Gov't Code § 2001.146.

[3] The District files this Motion, in relevant part, to preserve its rights and remedies on appeal. *See, e.g., Suburban Util. Corp. v. Pub. Util. Com.*, 652 S.W.2d 358, 364 (Tex. 1983) ("[A] motion for rehearing is prerequisite to an appeal.") (internal quotation marks omitted).

[4] Petition of Celina Partners, Ltd. to Amend Marilee Special Utility District's Certificate of Convenience and Necessity in Collin County by Expedited Release, at 2 (Aug. 16, 2021) (seeking to decertify 295.854 acres of property).

and is entirely within Collin County.[5]

On August 25, 2021, the District filed a motion to intervene, which the Honorable Administrative Law Judge ("ALJ") Siemankowski granted on September 15, 2021.[6]

On September 28, 2021, September 29, 2021, and September 30, 2021, Petitioner filed supplemental materials in support of the Petition.[7]

On November 9, 2021, the ALJ held that the Petition was administratively complete.[8]

On November 29, 2021, the District filed its Verified Response to the Petition, supported by the affidavits of the District's General Manager and engineer. The Verified Response provided affirmative evidence through affidavits and exhibits that, contrary to Mr. O'Donnell's affidavit in support of the Petition, he is a District customer.[9] Mr. O'Donnell initiated water service to the Tract of Land by applying for the Meter in 2001 and paying the fees for District membership and to have a water line extended and the Meter placed.[10] The District's records for the Meter reflect that it has been supplying water service continually since Mr. O'Donnell took the necessary steps to have the District put the Meter in service.[11] The most recent Meter reading date is August 23, 2021.[12] The District does not have any records indicating a request for termination of water service or of the Mr. O'Donnell's Membership.[13]

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[5] *Id.*

[6] Marilee Special Utility District's Motion to Intervene (Aug. 25, 2021); Order No. 2 – Granting Intervention (Sept. 15, 2021).

[7] Letter supplementing/replacing exhibits in Petition filed on August 16, 2021 (Sept. 28, 2021); Filing letter, replacing previous filed exhibit, and supplementing with additional shapefiles (Sept. 29, 2021); PUC filing letter filing full-sized maps (Sept. 30, 2021).

[8] Order No. 7 – Finding Petition Administratively Complete and Notice Sufficient and Establishing Procedural Schedule (Nov. 9, 2021).

[9] Marilee Special Utility District's Verified Response to Petition for Expedited Release from Water CCN No. 10150, at ¶¶ 21-22 (Nov. 29, 2021).

[10] *See id.* at ¶¶ 22-23 (describing Mr. O'Donnell's membership with the District); Exhibit A (Affidavit of Donna Loiselle) at ¶¶ 7-12 and accompanying exhibits (describing that Mr. O'Donnell became a member of the District, then Gunter, in 2001, and paid for Meter No. 1344, which has provided continuous service to the Property).

[11] *Id.*

[12] *Id.*

[13] *Id.*

In addition to the active District meter providing continual water service to the Tract of Land, which is a tree farm, the District has ample waterlines and facilities near the Tract of Land to provide it with water service, all of which were detailed in the District's verified response. These waterlines and facilities include, but are not limited to, the following:

- Well No. 7, south of the Tract of Land;
- A 10" well line, south of the Tract of Land;
- One 8" waterline, east of the Tract of Land;
- One 6" waterline, north of the Tract of Land;
- One 2" waterline on the northwest corner of the Tract of Land; and
- One 1 ½" waterline on the south side of the Tract of Land.[14]

Despite the District's affirmative evidence that the Tract of Land is receiving water service, the ALJ entered a proposed order decertifying the Property on February 15, 2022.[15] The District filed Exceptions and Corrections to the proposed order, which were rejected the next day.[16] The Commission entered the Order decertifying the Tract of Land from the District's CCN on April 4, 2022.[17]

The Commission's decision to grant the Petition was an error. The Commission's Order contains factual, procedural, and legal errors that require correction in order to prevent the unlawful and inequitable decertification of the Tract of Land from the District and to prevent the District from being materially prejudiced, as described herein. Accordingly, the District respectfully requests that the Commission grant the District's Motion, reverse the Order, and enter a final order denying the Petition because the Tract of Land is receiving service from the District and is thus ineligible for expedited release under TWC § 13.2541 and 16 TAC § 24.245(h), and because the District's federal indebtedness entitles the District, under 7 U.S.C. § 19267(b), to protection from curtailment or limitation of its service area.

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[14] *Id.* at ¶ 24; *id.* at Exhibit B (Affidavit of Jacob Dupuis) at ¶¶ 5-8 (describing the District's meters, waterlines, and facilities on and in close proximity to the Tract of Land).

[15] Proposed Order and Memorandum (Feb. 15, 2022).

[16] Marilee Special Utility District's Exceptions and Corrections to the Proposed Order (Mar. 1, 2022); Revised Proposed Order Memorandum (Mar. 2, 2022).

[17] Order (Apr. 4, 2022).

II. POINTS OF ERROR

A. Point of Error No. 1—The Commission Erred in Holding that the Tract of Land Is Not Receiving Water Service from the District (FOF Nos. 23-31 and COL Nos. 8, 12, and 13 and Ordering Paragraph 1.).

The TWC authorizes decertification or expedited release only for property "that is not receiving water or sewer service."[18] The TWC broadly defines "service" as:

> any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties...to its patrons, employees, other retail public utilities, and the public, as well as the interchange of facilities between two or more retail public utilities.[19]

Whether or not a retail public utility has performed "any act," "supplied or furnished" anything, or "committed or used" "any facilities or lines" in in the "performance of its duties" is a fact question. According to the plain text of the definition of "service" and how both the Commission and Texas courts have interpreted it, the question of whether or not a tract is receiving "service" is not dependent upon whether water or sewer is being used or has been requested on the tract sought to be decertified. Instead, a tract is "receiving" water or sewer service if either of the following conditions are met:

- Any facilities or lines are committed or used in the performance of the CCN holder's duties as a retail public utility providing service to the property; or
- Any lines are committed or used in the performance of the CCN holder's duties as a retail public utility.[20]

As defined by TWC § 13.002(9), "facilities" includes "all the plant and equipment of a retail public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with the business of any retail public utility." *Crystal Clear* held that facilities or lines "used" or "committed" to providing

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[18] TWC § 13.2541(b).

[19] TWC § 13.002(21); *see also* 16 TAC § 24.3(33) (same definition).

[20] *See id.; see also Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 137 (Tex. App.—Austin 2014, pet. denied).

such service can cause a property to "receive service."[21]

The Commission's Order errs in its analysis of whether the Tract of Land receives water service. The Order fails to explain why it concludes that the Tract of Land is "not receiving water service under TWC § 13.002(21) and 13.2541(b) and 16 TAC § 24.245(h), as interpreted [*Crystal Clear*]"[22] when the Order itself states that the following facts are present:

- "The CCN holder owns and operates a six-inch waterline running through the western-most portion of the tract along County Road 132, but the waterline does not provide water service to the tract of land."[23]
- "The CCN holder owns and operates additional water system infrastructure located outside of, but in proximity to, the tract of land. None of this infrastructure provides water service to the tract of land.."[24]

Here, the District has served and is capable of serving the "petitioner's tract of land," as demonstrated in the verified response. The Tract of Land is thus receiving "service" as interpreted by *Crystal Clear*. There are District facilities currently serving the property on which the Tract of Land is located that are in use to irrigate the Tract of Land. The Commission seems to deliberately overlook the fact that the District provides water service to Petitioner's land, including the Tract of Land. The Commission's indifference to these facts has now led to the District being damaged by the Commission taking acreage that the District is serving and which the District relies upon for paying its debts. Such an outcome was not intended by the legislature when the streamlined expedited release process was created.[25]

If the Commission permits Petitioners to decertify property that the CCN holder can service

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[21] *Crystal Clear*, 449 S.W.3d at 140.

[22] Order, at COL 12.

[23] *Id.* at FOF 27.

[24] *Id.* at FOF 28.

[25] *See, e.g.*, House Comm. Bill Analysis at 4-5, C.S.H.B. 2876, 79th Leg., R.S. (May 11, 2005) (noting in support that the bill would "would protect private property rights by unwanted imposition of a CCN on a landowner" and "*address problems* where residents of MUDs with *substandard service are unable to receive improvements*" due to the CCN holder's exclusive right to provide service in its area) (emphasis added).

and is servicing, then the Commission is not taking into account the important public policy of preserving a CCN holder's service area and is subjecting CCN holders to abusive tactics of landowners that were not intended by the legislators when they created the mechanism for streamlined expedited release.[26] For this reason, the District respectfully urges the Commission to grant the District's Motion and issue an order denying the Petition.

B. Point of Error 2 - The Commission Erred by Failing to Hold Petitioner to Its Burden of Proof Under TWC § 13.2541 and 16 TAC § 24.245(h) (FOF Nos. 5, 6, 7, 9, 21, 22, 27, 30, 31, 32, 33 and COL Nos. 5, 6, 7, 13, and Ordering Paragraph 1.).

In order to carry their burden of establishing that the Tract of Land is not receiving water service, the petitioner in a proceeding brought under TWC § 13.2541 and 16 TAC § 24.245(h) has the burden to prove that the area requested to be decertified is not receiving service. It is arbitrary and capricious for the Commission to decertify property from a CCN when a petitioner fails to set forth facts to establish that the property is not receiving service, as here, where Petitioner set forth only an affidavit that provided no facts regarding water service, but merely unsupported claims.

Under *Crystal Clear*, the Commission must review the present facts and circumstances, including the service application and agreements (including transfer agreements) that cover all the acres of the tract at issue. In *Crystal Clear*, the Austin Court of Appeals held that facilities or lines "used" or "committed" to providing such service might cause a property to "receive service" under the statutory and regulatory definition.[27] But where water lines are actually present within a tract and "committed" to the property in that manner, the tract is unquestionably "receiving service."

The proper analysis of a Petitioner's burden is reflected in *Johnson County Special Utility*

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[26] *See, e.g.*, House Comm. Bill Analysis at 4-5, C.S.H.B. 2876, 79th Leg., R.S. (May 11, 2005) at 4-5 (stating that TWC § 13.254 was designed to prevent "abuses of CCN authority" where "a landowner looking to develop his or her land might find that although the land was in a CCN, that utility was unable or unwilling to extend service to his or her property." Section 13.254 was not meant to arbitrarily deprive CCN holders of property they are actively servicing.). Streamlined expedited release was created in 2019 to be a simplified offshoot of expedited release that better codified the way CCN holders should be compensated for property decertified from their CCN service area. *See, e.g.*, Acts 2019, 86th Leg., R.S., Ch. 688, General and Special Laws of Texas (enrolled bill to be codified at TWC § 13.2541). The policies considered by the legislature regarding the substance of both TWC §§ 13.254 and 13.2541 are best reflected by the legislative history for TWC § 13.254, which was enacted in 2005 in House Bill 2876.

[27] *Crystal Clear*, 449 S.W.3d at 140.

District v. Public Utility Comm'n of Texas.[28] The petitioner in that case provided a detailed affidavit by a land broker on the grounds of the property to be decertified, in which the broker stated that he searched the property, which was inhabited, for several hours and found no district water meters or facilities, only "two shuttered ground well heads" and a "small, elevated water storage tank . . . implying that any dwelling on the [p]roperty required that water pressure be generated locally and not from a retail water utility service provider."[29] The Commission, based on these facts, properly decertified the property as having not water service from at least 2005.[30]

Here, Petitioner has not met its burden of proof to decertify the Tract of Land under TWC § 13.2541. Petitioner's affiant is a District customer, which the District failed to mention. The Tract of Land is an irrigated tree farm, which Petitioner failed to mention. The Order improperly permits Petitioner to decertify Tract of Land that the District is providing service to, as evidenced by the District's existing meters, waterlines, facilities, and billing and membership records. The Commission's approval of Petitioner's "carving out" portions of the Tract of Land from the existing meters, waterlines, and facilities, and acceptance of Petitioner's insufficient affidavit eviscerates Petitioner's burden of proof, and improperly puts all the burden on the District to prove that the Tract of Land is receiving, has received, and is capable of receiving water service under TWC § 13.2541 and *Crystal Clear*.

C. Point of Error 3—The Commission Erred When It Failed to Meet the 60-Day Statutory Deadline to Either Grant or Deny Expedited Release (FOF 7, COL Nos. 1, 13, 16 and Ordering Paragraphs 1.).

The Commission erred in granting the Petition because it did so in clear violation of TWC § 13.2541(c), which provides, "The utility commission shall grant the petition not later than the 60th day after the date the landowner files the petition." Further, the Order violates the Commission's substantive rules, which require the Commission to "issue a decision on a petition" for streamlined expedited release "no later than 60 calendar days after the presiding officer

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[28] No. 03-17-00160-CV, 2018 WL 2170259 (Tex. App—Austin May 11, 2018, pet. denied) (mem. op.).

[29] *Id.* at **6-7.

[30] *Id.* at **9-10 (citing Commission's Finding of Fact No. 24).

determines that the petition is administratively complete."[31]

The original petition was filed on August 16, 2021, and was found administratively complete on November 9, 2021.[32] Sixty calendar days after November 9, 2021, is January 10, 2022, the date by which the Commission was required to issue a decision either granting or denying the Petition. In violation of TWC § 13.2541(c) and 16 TAC § 24.245(h)(7), the Commission failed to enter a decision on the Petition until April 4, 2022. As a result of the Commission's errors, the District has been required to proceed through nearly three months of additional litigation.

The Commission's error materially prejudiced the District. For example, another Commission rule states that the District should not apply for any federal loan "after the date the petition is filed until the utility commission issues a decision on the petition."[33] It is prejudicial but for the District to be prevented from seeking financing for needed improvements solely because the Commission failed to follow its mandatory statutory and rule requirements.

Because of the Commission's error in its treatment of the Petition, the District has been materially prejudiced by, among other things, legal costs, delays to needed financing, and improper limitation and curtailment of its service area.

D. The Commission Erred by Curtailing and Limiting the Service Area of a Federally Indebted Entity Protected by 7 U.S.C. § 1926(b) (FOF Nos. 18 and COL Nos. 13, 14, and Ordering Paragraph 1.).

Pursuant to the Consolidated Farm and Rural Development Act of 1961 and 7 U.S. Code § 1926, the United States Department of Agriculture ("USDA") may make or insure loans to associations and public and quasi-public agencies. To protect a USDA debtor's ability to service its debt, it is prohibited by federal law to "curtail or limit" the service area of a USDA debtor. The statute provides:

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[31] 16 TAC § 24.245(h)(7).

[32] *See* Order No. 7 – Finding Petition Administratively Complete and Notice Sufficient, and Establishing Procedural Schedule (Nov. 9, 2021).

[33] TWC § 13.2541(e); 16 TAC § 24.245(h)(8). However, the Commission does not have authority to enforce these against the District. *See* Docket 52101, *Petition of CCD North Sky, LLC to Amend Marilee Special Utility District's Certificate of Convenience and Necessity in Collin County by Expedited Release*, Order No. 11 – Denying Petition Request for an Order Requiring Marilee Special Utility District to Withdraw Its Federal Loan Application, at 1 (Oct. 25, 2021).

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.[34]

To be eligible for protection under § 1926(b), the District must show, in addition to federal indebtedness, that it satisfies the "physical abilities" test, as adopted by the U.S. Court of Appeals for the Fifth Circuit, sitting en banc in *Green Valley Special Utility District v. City of Schertz*.[35] Judge Smith, writing for the majority, characterized the "physical abilities" test broadly:

> To make the test easy to apply to both water and sewer service, we hold that a utility must show that it has (1) adequate facilities to provide service to the area within a reasonable time after a request for service is made and (2) the legal right to provide service. A utility cannot satisfy that test if it has no nearby infrastructure. But 'pipes in the ground' is a colloquial shorthand, not a strict requirement.[36]

The en banc court in *Green Valley* cited with approval precedent from the U.S. Court of Appeals for the Sixth Circuit stating that, to satisfy the "physical abilities" test, the utility must have "something in place to merit § 1926(b)'s protection."[37] The Court further explained the broad interpretation, "[s]ervice may be 'available' even if it cannot be immediately used. No water or sewer utility can make service immediately available to rural, undeveloped land; providing such service involves building or installing facilities, which necessarily takes time to accomplish."[38] Based on the District's meters and waterlines located inside the boundaries of the Tract of Land, as reflected in Exhibit B-1, the District is unquestionably providing actual service to the Tract of Land and, accordingly, more than satisfies the "physical abilities" test.

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[34] 7 U.S.C § 1926(b).

[35] 969 F.3d 460 (5th Cir. 2020) (en banc).

[36] *Green Valley*, 969 F.3d at 477.

[37] *Id.* at 477 & n.36 (quoting *Lexington—S. Elkhorn Water Dist. v. City of Wilmore*, 93 F.3d 230, 238 (6th Cir. 1996)).

[38] *Id.* at n.38.

The District is now consolidated with Mustang Special Utility District ("Mustang SUD") (together with the District, the "Consolidated District"), in accordance with TWC Chapter 65, Subchapter H.[39] Voters within the two districts passed measures consolidating the districts on November 2, 2021 and the elections have been canvassed.[40]

Prior to consolidation with the District, Mustang SUD was already indebted to the United States of America Department of Agriculture, Rural Utilities Service, which purchased bonds from Mustang SUD in 2016, in the amount of $14,142,000 and 2018, in the amount of $1,000,000 (collectively, the "Bonds").[41] The District assumed Mustang SUD's federal indebtedness when the District and Mustang SUD were consolidated.[42] The District will be required to make payments on the Bonds until 2055 (2016 Bonds) and 2058 (2018 Bonds).[43]

On July 12, 2021, the District received approval from the USDA for a Water and Wastewater Guaranteed loan of $1,553,000.[44] The District has not closed on the USDA loan but is working diligently to do so.

Under *Green Valley*, a federally indebted CCN holder has an equitable cause of action for prospective injunctive relief, preventing ongoing or future limitation or curtailment of its service area by the Commissioners.[45] As the Consolidated District is federally indebted, and with the

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[39] *See* TWC § 65.723 ("Two or more districts governed by this chapter may consolidate into one district as provided by this subchapter."); *see also, e.g.*, *Petition of Sater L.P. to Amend Marilee Special Utility District's Certificate of Convenience and Necessity in Collin County by Streamlined Expedited Release*, Docket No. 52739 (pending) Marilee Special Utility District's Verified Response, at Exhibit A (Affidavit of Michael Garrison) at ¶¶ 8-9 & accompanying exhibits (affirming that the District has been consolidated with Mustang SUD) and Exhibit C (Affidavit of Chris Boyd) ¶¶ 3-4 & accompanying exhibits (affirming that Mustang SUD has been consolidated with the District) (Mar. 3, 2022).

[40] *See* TWC § 65.724 (describing procedure).

[41] *See* Docket No. 52739, Marilee Special Utility District's Verified Response, at Exhibit C (Affidavit of Chris Boyd), at ¶ 5.

[42] TWC § 65.726

[43] *See* Docket No. 52739, Marilee Special Utility District's Verified Response, at Exhibit C (Affidavit of Chris Boyd), at ¶ 5.

[44] *See* Marilee Special Utility District's Verified Response to Petition of Celina Partners, Ltd at ¶¶ 27-32 (describing District's pending federal indebtedness); *id.* at Exhibit A (Affidavit of Donna Loiselle) at ¶¶ 13-15 and accompanying exhibits (describing District's pending federal indebtedness).

[45] *See Green Valley*, 969 F.3d at 475 ("Because . . . Green Valley has satisfied *Young*'s requirements, its suit for injunctive relief against the PUC Officials may go forward.") (citing *Ex parte Young*, 209 U.S. 123 (1908)).

scheduled closing of the USDA loan approaching, the District has a federal equitable cause of action against the Commissioners should the Commissioners take action to limit or curtail of its service area.

E. Point of Error 5—The Commission Erred by Omitting Relevant Facts and Law from the Order, Thereby Creating an Unclear Record.

The Order omits significant procedural events that occurred during this proceeding from its Findings of Fact. In order to have a clear record on appeal, the District respectfully requests that the Order be revised to include new Conclusions of Law substantially similar to the following:

- **Proposed COL 2A.** Under TWC § 13.2541(c) and 16 TAC § 24.245(h)(7), the Commission must issue a decision on a petition for streamlined expedited release no later than 60 calendar days after the presiding officer determines that the petition is administratively complete.
- **Proposed COL 6A.** A petitioner seeking streamlined expedited release must file with the Commission a petition and supporting documentation verified by a notarized affidavit and containing (A) a statement that the petition is being submitted under TWC §13.2541 and 16 TAC § 24.245(h); (B) proof that the tract of land is at least 25 acres in size; (C) proof that at least part of the tract of land is located in the current CCN holder's certificated service area and at least some of that part is located in a qualifying county; (D) a statement of facts that demonstrates that the tract of land is not currently receiving service; (E) copies of deeds demonstrating ownership of the tract of land by the landowner; (F) proof that a copy of the petition was mailed to the current CCN holder via certified mail on the day that the landowner filed the petition with the commission; and (G) the mapping information described in 16 TAC § 24.245(k).

III. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, the District respectfully requests that the Commission grant its Motion for Rehearing, deny the Petition, all as set forth above, in all respects and grant the District such additional and further relief to which it may be entitled.

Respectfully submitted,

By: _____

John J. Carlton
State Bar No. 03817600
Grayson E. McDaniel
State Bar No. 24078966
The Carlton Law Firm P.L.L.C.
4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
Fax (512) 900-2855
john@carltonlawaustin.com
grayson@carltonlawaustin.com

ATTORNEYS FOR MARILEE SPECIAL UTILITY DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that I have served or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested to all parties on this 29th day of April 2022.

_____
Grayson E. McDaniel